

COMMITTEE FOR PUBLIC COUNSEL SERVICES

PERFORMANCE GUIDELINES

GOVERNING THE REPRESENTATION OF INDIGENT PERSONS IN CRIMINAL CASES IN DRUG COURTS

A. Prior to appearing in a drug court session for the first time or to advising a client of the advantages and disadvantages of entering a drug court program, counsel should thoroughly investigate the policies and practices of the session, including the following:

1. conformity of the program with the Trial Court Policy for Drug Court Sessions (“Policy”), including the provision that “[n]o defendant shall be required to surrender any of his or her due process rights as a condition of assignment to or participation in any drug court session” Policy, § IX, ¶ 7;
2. eligibility requirements and restrictions;
3. the role and responsibilities of each party within the session, including the judge, prosecutor, probation officer, treatment provider and defense attorney;
4. the procedures for addressing violations of program requirements, imposition of graduated sanctions, and modifications which may result in confinement;
5. the procedures for addressing violations of probation which may result in termination of the client from the program;
6. the ability of a client to voluntarily withdraw from the program.

B. Drug courts operate within a framework that encourages a non-adversarial, “team” approach by all parties. The sole responsibility of counsel, however, is to advocate for and protect the interests of a client; it is not to be part of a team. Counsel should always advocate zealously for a client consistent with the role of defense counsel as described in the [*CPCS Performance Guidelines Governing Criminal Cases*](#), § 1.1.

C. Discussions of a client’s participation in a drug court session which include the judge, probation officers, treatment providers and prosecutors, sometimes referred to as “team meetings,” must comport with due process rights of the client. Policy, § IX, ¶ 8. If a judge is present, due process requires that such discussions occur on the record and in the client’s presence. Upon a client’s first appearance in a drug court session, counsel should file a written motion requesting that any discussions with a judge concerning the client occur on the record and in the client’s presence. If the motion is denied, counsel should object on the record.

D. Counsel should only participate in a “team meeting” or discussion involving a client whom counsel represents, after counsel has had sufficient opportunity to meet with the client, investigate the case, and prepare to represent the interests of the client. Counsel should not participate in a “team meeting” or other discussions concerning drug court participants who are not clients.

E. Whenever a probation officer, treatment provider or prosecutor advocates to a judge that a client at liberty should be subjected to any form of confinement (including inpatient substance abuse treatment), the client is entitled to be represented by counsel. ABA Standards Relating to Probation § 3.3 (Approved Draft, 1970); *Commonwealth v. Faulkner*, 418 Mass. 352 (1994). In addition to the right to counsel, a request for modification of conditions of probation that results in confinement (as distinct from a request for probation detention pursuant to a notice of surrender) triggers other due process rights, including the right of the client to notice of the reasons confinement is being requested, the right of the client to be present, and the opportunity to be heard and to challenge the requested modification.

F. Counsel should be familiar with the Trial Court Policy for Drug Court Sessions and should be prepared to cite from it when advocating for a client.

G. When representing a client in a drug court session, counsel should have a thorough understanding of the law governing probation detention and probation surrenders and of its applicability to drug court sessions. Counsel should ensure that the court provides the client “the same due process rights as other persons placed upon probation supervision.” Policy, § IX, ¶ 7.

H. When discussing with a client the advisability of entering a drug court program, counsel should fully explain to the client the policies and practices of the program. Prior to providing such advice, counsel should interview the client, fully investigate the case, research the viability of any motions to dismiss and/or motions to suppress, and prepare a defense in the event the case proceeds to trial. Counsel should not advise a client at arraignment about whether to enter a drug court program. The decision whether to enter a drug court program belongs to the client after full consultation with counsel. See [*CPCS Performance Guidelines Governing Criminal Cases*](#), §§ 5.1 - 5.2.

I. After adequate consultation with counsel, if a client wishes to enter a drug court program, counsel should vigorously advocate for acceptance of the client into the program despite policies which may make the client ineligible (e.g., if the client is charged with a sex offense and the policy of the program excludes individuals charged with such offenses).

J. Counsel should vigorously advocate for the admission of a client who wishes to enter a drug court program after arguing a motion to suppress, a motion to dismiss, or after a jury trial, despite the policy of the program that requires the waiver of due process rights prior to admission. In advocating for the client’s admission, counsel should cite the Trial Court Policy for Drug Court Sessions that prohibits exclusion on those grounds. Policy, § IX, ¶ 7.

K. Counsel should be familiar with federal and state law governing confidentiality of substance abuse treatment records and its applicability to treatment received by clients participating in drug court sessions. See 42 U.S.C. 290dd-2 (can be found at <http://www.findlaw.com>); 42 C.F.R. §§2.1-2.67 (found at <http://www.access.gpo.gov/nara/cfr/index.html>); G.L. c. 111E, § 18.

1. Counsel should fully explain to a client the laws governing confidentiality of substance abuse treatment records and of statements of the client made in the course of such treatment. Counsel should further advise a client that, despite laws restricting the use of treatment records to prosecute or criminally investigate a client, especially in the case of serious crimes, the possibility exists that treatment records could be used in a subsequent prosecution of the client.

2. Upon entering a drug court program, a client will be requested to sign a consent form which permits substance abuse treatment providers to disclose information about the client to drug court personnel, i.e., the judge, probation officer, prosecutor and defense attorney. Counsel should fully explain the waiver before the client signs it. Counsel should add language to the waiver that consent of the client is limited to use of the information in the drug court session, and the client does not consent to disclosure for use in any other context, including for any subsequent prosecution or criminal investigation.